Reasons for Granting the Writ

I.

Prior to the decision in the case at bar the decisions of the various Circuit Courts of Appeals presented a reasonably distinct and uniform standard for a district court judge to follow when discharging the duty imposed by Rule 11 of the Federal Rules of Criminal Procedure. The petitioner respectfully submits, however, that the decision of the Court of Appeals for the First Circuit in this case, even if not found to be irreconcilable with decisions of other circuits, makes the mandate of Rule 11 so unclear that a definitive statement is needed in order to protect the rights of defendants in Federal courts. In short, the petitioner asks this court to clarify the requirements of Rule 11 of the Federal Rules of Criminal Procedure as it did with Rule 32 (a) in *Green* v. *United States*, 365 U.S. 301.

It is clear from the words of Rule 11 that the trial court must make this two-fold inquiry before accepting a plea of guilty: (1) Is the plea voluntarily made? (2) Is the plea made with an understanding of the nature of the charges?

That the Court of Appeals for the Seventh Circuit has adopted this meaning of Rule 11 can be seen from its decision in *United States* v. Mack, 249 F.2d 421, 423 where the Court said that

> "the very absolute minimum required to comply with the mandate of Rule imposed upon the District Court the necessity of ascertaining if that was the defendant's desire; if she was pleading guilty voluntarily and if she understood the nature of the charges to which she was entering a plea of guilty."

For an earlier formulation of this principle by the same court see *United States* v. *Davis*, 212 F.2d 264.

From the decision of the Court of Appeals for the Second Circuit in *United States* v. *Lester*, 247 F.2d 496, 500 it is clear the trial judge before accepting a plea of guilty must "thoroughly investigate the circumstances under which it is made." Although the court in the *Lester* case does acknowledge that a more searching inquiry is required when the defendant is without counsel, it is also said that "the asking of several standard questions" is not sufficient, if the defendant has counsel.

As recently as June 1961 when the Court of Appeals for the First Circuit decided *Domenica* v. *United States*, 292 F.2d 483, in an opinion which quoted extensively from the *Lester* case, it would have seemed that a trial judge sitting in the First Circuit was bound to apply Rule 11 exactly the same as trial judges in the Seventh and Second Circuits. Indeed, the factual situation in *Domenica* was less compelling than the *Lester* case, for the defendant in *Domenica* was represented by counsel of his own choice when the guilty plea was entered.

The opinion of the Court of Appeals in the case at bar contains the following discussion of the Rule 11 inquiry:

> "At the time the appellant was represented by competent counsel *but nevertheless* the court asked the defendant-appellant personally if he entered his pleas voluntarily and he answered: 'Yes, sir' ". (emphasis supplied)

Clearly from the use of the word "nevertheless" it was the opinion of the Court that the trial judge, in a case where the defendant has counsel, is not even required to make the cryptic inquiry made by the judge in the case at bar.

The petitioner respectfully submits that the *per curiam* opinion of the Court of Appeals for the First Circuit, in which no authorities are cited, represents a departure from

the rule of the Seventh Circuit as announced in *United States v. Mack*, 249 F.2d 421 and the rule of the Second Circuit as announced in *United States v. Lester*, 247 F.2d 496. Moreover, it is the petitioner's position that by approving the practice of asking a defendant only whether his plea is voluntary, the court so diminished the precedent value of *Domenica v. United States*, 292 F.2d 483, that meaning of Rule 11 in First Circuit is now unclear.

II.

With the exception of the failure to properly investigate the petitioner's mental condition discussed below, the petitioner does not assert that the hearing conducted on the post-sentencing motion was inadequate. It is the petitioner's position, however, that a hearing conducted after sentencing is not the equivalent of a hearing conducted prior to sentencing, because the petitioner was faced with a substantially heavier burden of proof on the post-sentencing motion than on the motion made prior to sentence.

Although the language of Rule 32 (d) of the Federal Rules of Criminal Procedure does not spell out any standards for granting a withdrawal before sentence, it is apparent from the use of the phrase "to correct manifest injustice" with respect to withdrawal after sentencing that the burden on the defendant is lighter when the motion is made before sentencing. This distinction was recognized in *Poole v. United States*, 250 F.2d 396 and *Swaggerty v. United States*, 218 F.2d 875 cert. den. 349 U.S. 959.

In the case at bar no hearing was granted on the petitioner's motion to withdraw his plea of guilty before sentencing. (DR 36-37; GR 58-59) While there is no question that this motion is addressed to the discretion of the trial judge, the concept of judicial discretion has implicit within it the principle that a discretionary act will not be

taken until the Judge has adequately informed himself. *Gearhart* v. *U. S.*, 272 F.2d 499, 502.

This court defined the word "discretion" as follows in *Langnes* v. *Green*, 282 U.S. 531, 541:

> "The term 'discretion' denotes the absence of a hard and fast rule. The *Styria* v. *Morgan* 186 U.S. 1, 9. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion with regard to what is right and equitable under the circumstances and the law and directed by the conscience of the Judge to a just result."

Although *Langnes* was an admiralty case, this definition has been applied in criminal cases. *Burns* v. *United States*, 287 U.S. 216; *Larson* v. *United States*, 296 F.2d 167; *Hamilton* v. *U. S.*, 219 F.2d 364.

The petitioner respectfully contends that it was an abuse of discretion for the trial judge to deny his pre-sentencing motion without a full hearing. This contention is supported by the decision of this court in *Bremmer* v. *United States*, 347 U.S. 227, a case in which the trial court, in the exercise of its discretion, denied without a hearing a motion for a new trial.

In addition to abusing his discretion, the trial judge also deprived the petitioner of a fundamental constitutional right by failing to hold a hearing on his motion to withdraw the plea. While the famous case of *Powell* v. *Alabama*, 287 U.S. 45 is frequently cited for the proposition that due process requires that an accused by given the right to counsel, this court has recently held in *Reynolds* v. *Cochoran*, 365 U.S. 525 that the right to counsel is effective only so long as counsel is given the opportunity to be heard. The petitioner respectfully submits to this court that following passage from *Powell* v. *Alabama*, supra, which is

quoted in *Reynolds* v. *Cochoran*, supra, at p. 529, is desposi-tive of his case:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by or appearing for him, it reasonably may not be doubted that such a refusal would be denial of a hearing, and therefore of due process in the constitutional sense."

III.

During the course of "the" hearing on the post-sentencing motion there was testimony of the petitioner's wife (DR 67-71, GR 85-88) and the petitioner (DR 78-79, 89-90, GR 95-96, 106-107) relating to the mental condition of the petitioner at the time of trial. The trial judge also had before him as an exhibit a memorandum from the files of the attorney who first represented the petitioner, which contained a description of the petitioner's mental health background and a brief description of his psychiatric treatment. (Dr 150-151). In spite of this evidence, which was uncontradicted by any government evidence and not mentioned during the government's cross examination of the petitioner or his wife, the trial judge made no order for a psychiatric examination. Moreover, from that portion of the opinion of the Court of Appeals where it is said "(t)hat there is nothing whatever to show that the defendant's change of plea was not made voluntarily and with full knowledge of its consequences," it would seem that this evidence was held to be without significance.

Factually the case at bar is substantially the same as *Dandridge* v. *United States*, 356 U.S. 259, a case in which this court held that when it is alleged that a guilty plea was rendered by a defendant who was mentally incompetent

to enter such a plea, evidence should be taken to determine the mental condition of the accused.

The holding of the *Dandridge* case is difficult to discern because short per curiam opinions were written in the Court of Appeals and in this court, yet the holding which the petitioner sets forth above is that which was given to the *Dandridge* case in *Gearhart* v. *United States*, 272 F.2d 499.

Since the defendant in *Gearhart* alleged inability to reason at the time of the crime as well as the time he pleaded guilty, the court held that a determination of the defendant's mental condition would involve a decision on an affirmative defense, so the failure of the trial judge to order a mental examination was not error. It is clear, however, from the opinion in the *Gearhart* case that when there is an allegation only of incompetence at time of pleading a mental examination should be ordered.

IV.

In his affidavit filed in conjunction with the post sentencing motion to withdraw his plea, the petitioner swore that he entered the plea based on information that he would receive probation and a small fine (DR 63). The petitioner testified at the hearing on this motion that his attorney had told him the United States Attorney's office had indicated that on a plea of guilty there would be a small fine and probation. (DR 77,78)

In spite of the affidavit and this testimony, and apparently relying solely on the testimony of the petitioner's attorney (DR 96-99), the opinion of Court of Appeals for the First Circuit states: "*There is nothing whatever to show* that the defendant's change of plea was not made voluntarily and with full knowledge of its consequences or that it was made upon representations of the United States

Attorney that he could recommend a light sentence." (Emphasis supplied)

Since it is very unlikely that the Court of Appeals was unaware of the existence of petitioner's affidavit and testimony, it must be assumed that words "nothing whatever" in the opinion are to be taken as meaning "nothing whatever of *legal significance.*"

There being no citation of authority in the opinion, it is difficult to determine the source of the rule which says that the testimony of a defendant as to representations made to him and testimony as to his beliefs prior to pleading guilty are without legal significance.

The petitioner respectfully submits that the rule is to the contrary. A district judge must determine whether representations were made to a defendant and whether the defendant could reasonably rely on such representations.

In *United States* v. *Lias*, 173 F.2d 685, 687, the court quotes with approval the following language from a memorandum filed by district judge after hearing a motion to withdraw a plea:

> "The defendant has sworn to his motion to vacate judgment. He says under oath that he entered his plea because he believed that he would be put on probation or receive a suspended sentence. If the defendant had that bona fide belief in his mind and if that belief was a controlling factor in causing him to enter a plea of guilty, the court has to take that belief into consideration irrespective of the kind of information upon which it was founded."

Since the district judge in the case at bar filed no opinion or memorandum, it is impossible to tell what weight, if any, he assigned to the petitioner's affidavit and testimony. Thus it is impossible to tell whether he considered this

evidence. Moreover, the language of the Court of Appeals' opinion indicates that, as a matter of law, this evidence is without significance. This decision is squarely in conflict with the decision of the Court of Appeals for the Fourth Circuit in *United States v. Lias*, 173 F.2d 685.

Conclusion

For the foregoing reason this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 5954.

H. HENRY YOUNG,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Israel Bernstein for appellant.

James W. Noonan, Special Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

April 27, 1962.

PER CURIAM. During the course of trial on October 3, 1961, the appellant changed pleas of not guilty to pleas of guilty as to the first two and last counts of a 22 count indictment returned against him and others almost a year before charging various substantive offenses in connection with proceedings in bankruptcy in violation of Title 18 U.S.C. § 152, and in its final count with conspiracy in connection therewith in violation of Title 18 U.S.C. § 371. At the time the appellant was represented by competent counsel but nevertheless the court asked the defendant-appellant

personally if he entered his pleas voluntarily and he answered: "Yes, sir." On December 14, 1961, when the appellant appeared for sentence the court without objection granted the government's motion to dismiss counts 3 through 21 of the indictment, and thereupon counsel for the appellant moved orally for leave for the defendant to withdraw his previous pleas of guilty as to counts 1, 2 and 22 and to go to trial on those counts on reinstated pleas of not guilty. The court immediately denied the motion and proceeded to sentence, but stayed execution to December 19. On December 18 defendant's counsel filed a written motion under Rule 32(d) of the Federal Rules of Criminal Procedure to vacate the judgment of sentence and for leave to withdraw the defendant's pleas of guilty and accompanied his motion with an affidavit. The court after full hearing on the motion denied it and thereupon the defendant took the present appeal to this court.

The appellant has been represented throughout by diligent and skillful counsel well versed in the practice of criminal law in the federal courts, and an examination of the record discloses that he is an intelligent, educated, experienced business man who changed his pleas to guilty after full consultation with his counsel. There is nothing whatever to show that the defendant's change of plea was not made voluntarily and with full knowledge of its consequences or that it was made in reliance upon representations of the United States Attorney that he would recommend a light sentence. On the contrary, the evidence is that the United States Attorney refused to disclose what his recommendation for sentence would be in the event the defendant chose to plead guilty. Under these circumstances there was no abuse of discretion in denying the motion to vacate sentence.

Judgment will be entered affirming the judgment and orders of the District Court.

Appendix B

Federal Rules of Criminal Procedure

Rule 11.

Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

VII. Judgment

Rule 32.

Sentence and Judgment

(a) . . .

(b) . . .

(c) . . .

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.